# Public Prosecutor v Mohd Amin Choo Abdullah & Ors

HIGH COURT (KUCHING) — CRIMINAL TRIAL NO KG 6-1993(III)
ELIZABETH CHAPMAN JC
25 MAY 1995

***Criminal Law*** *— Penal Code (Malaysia) — s 34 — Common intention — Murder — Whether criminal act done in furtherance of a common intention — Penal code (Malaysia) s 34*

***Evidence*** *— Cautioned statement — Limits in its applicability — Whether cautioned statement could be made the foundation of a conviction or be used to fill in gaps in the prosecution evidence — Evidence Act 1950 s 30*

The six accused were charged with the offence of murder of a deceased in the early hours of 14 June 1991 at Lorong Nanas No 6, Nanas Road, Kuching under s 302 of the Penal Code (FMS Cap 45) read with s 34 thereof. According to the evidence of prosecution witness, the deceased and his friends went to Foo Lok Cafe on the night of 13 June 1991 at about 11pm. They saw two youths, the fifth and sixth accused, holding metal pipes rush into the shop and fought with a few customers at the next table. There was a commotion as the youths fought. During the fight, the deceased's car was hit. The deceased went over to tell them not to hit his car but was hit by the fifth accused. The deceased and his friends fought back in self defence. The sixth accused ran away leaving the fifth accused lying on the road near the drain. As the deceased and his friends were about to leave the place, the other accused arrived and knocked the deceased from behind with the car. The other accused then got out of the car. Some hit the deceased to death while some attacked his friends.

**Held**, first, second and fourth accused were found guilty while third, fifth and sixth were found not guilty:

(1) It was found as a fact that the first, second and fourth accused caused the injuries sustained by the deceased. The defence contention that the fatal injuries could have been caused by the first fight and inflicted by those other than the accused persons was rejected.

(2) Common intention could be inferred from the manner the deceased was attacked, from the injuries to his person, and from the way they went to the scene. The words uttered clearly showed beyond reasonable doubt that there was common intention and that the first, second and fourth accused were acting in furtherance of the common intention of them all.

(3) The cautioned statement of Bong Joon Pui had to be considered in the light of all the evidence adduced by the prosecution. The cautioned statement could not be made the foundation of a conviction nor could it be used to fill in gaps in the prosecution evidence. It could only be used to lend assurance and to support other evidence.

(4) It was unsafe to convict the fifth accused. Section 30 of the Evidence Act 1950 was limited in its applicability. The cautioned statement did not support the eye witnesses' version. What the fifth accused did when the eye witnesses were not looking could not be inferred. The cautioned statement could not be used to implicate him in that manner. The fifth accused was not the maker.

**[Bahasa Malaysia summary**

Enam orang si tertuduh telah dituduh dengan kesalahan membunuh pada awal 14 Jun 1991 di Lorong Nanas No 6, di bawah s 302 Kanun Keseksaan (NMB Bab 45) dibaca bersama dengan s 34 Kanun yang sama. Mengikut keterangan saksi pihak pendakwa, si mati dan kawan-kawannya telah pergi ke Foo Lak Cafe pada malam 13 Jun 1991 kira-kira pada jam 11 malam. Mereka ternampak dua orang pemuda, si tertuduh kelima dan keenam, dengan paip logam dalam tangan mereka memasuki kedai makan itu dan berlawan dengan beberapa orang pelanggan. Semasa pemuda-pemuda itu sedang berlawan, kekecohan berlaku. Ketika lawan-melawan berlaku, kereta si mati telah dipukul. Si mati telah memberitahu pemua-pemuda itu supaya jangan merosakkan keretanya tetapi telah dipukul oleh si tertuduh kelima. Si mati dan kawan-kawannya pun melawan balik untuk mempertahankan diri mereka sendiri. Si tertuduh keenam lari meninggalkan tempat itu walhal si tertuduh kelima terlantar di atas jalan berdekatan parit. Apabila si mati dan kawan-kawannya hampir hendak meninggalkan tempat itu, si tertuduh yang lain sampai dan melanggar si mati dari belakang dengan sebuah kereta. Si tertuduh yang lain kemudiannya keluar daripada kereta itu. Beberapa daripada mereka membelasah si mati sehingga beliau mati sementara si tertuduh yang lain menyerang kawan-kawan si mati itu.

**Diputuskan**, si tertuduh pertama, kedua dan keempat didapati bersalah sementara si tertuduh ketiga, kelima dan keenam didapati tidak bersalah:

(1) Didapati sebagai satu hakikat bahawa si tertuduh pertama, kedua dan keempat telah mengakibatkan kecederaan yang dialami oleh si mati. Hujah pihak pembela bahawa kecederaan yang menyebabkan kematian mungkin telah disebabkan oleh babak lawan-melawan yang pertama dan dilakukan oleh orang-orang selain daripada si tertuduh tidak boleh diterima.

(2) Niat bersama boleh dibuat kesimpulan daripada cara si mati diserang, daripada kecederaan pada dirinya, dan dairpada cara mereka pergi ke tempat itu. Perkataan-perkataan yang disuarakan jelas menunjukkan melampaui keraguan yang munasabah bahawa terdapat niat bersama dan bahawa si tertuduh pertama, kedua dan keeempat telah bertindak mengikut niat bersama mereka semua.

(3) Pernyataan beramaran Bong Joon Pui mesti dipertimbangkan bersama dengan semua keterangan yang dikemukakan oleh pihak pendakwa. Pernyataan beramaran itu tidak boleh dijadikan asas satu sabitan. Ia juga tidak boleh digunakan untuk mengisi kekosongan di dalam keterangan pihak pendakwa. Ia cuma boleh digunakan untuk memberi keyakinan kepada dan menyokong keterangan lain.

(4) Adalah tidak selamat untuk mensabitkan si tertuduh kelima. Seksyen 30 Akta Keterangan 1950 adalah terhad dalam pemakaiannya. Pernyataan beramaran itu tidak menyokong versi yang diberikan oleh saksi-saksi. Apa yang dibuat oleh si tertuduh kelima apabila saksi-saksi tidak melihatnya tidak boleh diambil kesimpulan. Pernyataan beramaran itu tidak boleh digunakan untuk membabitkannya dalam cara itu. Si tertuduh kelima bukanlah orang yang membuat pernyataan itu.]

**Notes**

For cases on common intention, see 4 *Mallal's Digest* paras 472–494; [1989] *Mallal's Digest* paras 586, 633–634; [1991] *Mallal's Digest* paras 806–810; [1992] *Mallal's Digest* paras 690–693.

**Legislation referred to**

Criminal Procedure Code (FMS Cap 6) s 198
Evidence Act 1950 s 30
Penal Code (FMS Cap 45) ss 34, 302

*Abdul Rahman Sebli* (Deputy Public Prosecutor) for the Public Prosecutor.

*Charles Kanavathy (CM Kanavathy & Co)* for the first, fifth and sixth accused.

*Anthony Tai (Anthony Tai Advocates)* for the second accused.

*Sim Thong Poh (Sim Thong Poh Advocates)* for the third and fourth accused.

**Elizabeth Chapman JC:** The six accused are charged with the offence of murder, ie the murder of Pang Chuan Khim (m) in the early hours of 14 June 1991 at Lorong Nanas No 6, Nanas Road, Kuching, under s 302 of the Penal Code (FMS Cap 45) read with s 34 thereof.

The evidence of PW19, Pang Chuan Cheng is that he and PW24, Pang Chuan Boon, PW26 Chin Hon Pin and Pang Chuan Khim (the

deceased) went to Foo Lok Cafe on the night of 13 June 1991 at about 11pm. Foo Lok Cafe was situated at Nanas Road. Whilst he and the rest of them were having their drinks he saw two youths holding metal pipes rush into the shop and fought with a few customers at the next table. He identified them as the fifth and sixth accused. There was a commotion as the youths fought and plates were thrown towards their table. During the fight one of them hit Chuan Khim's car which was parked in front of the coffee shop, causing a slight dent on the left hand side of the door. According to PW30, Supt Abdul Razak, the investigation officer of the case, he saw a slight dent on the left rear door — see also exh P7E, photograph of car bearing registration number KK 9986 Q.

Chuan Khim then went over to tell them not to hit his car but he was hit by the fifth accused with a metal pipe instead. Chuan Cheng (PW19), Chuan Boon (PW24) and Chin Hon Pin (PW26) tried to stop the fifth accused but the sixth accused came with a metal pipe and attacked them. The three of them then fought back in self defence. Chuan Boon held a chair while Chuan Khim and PW19 were not armed. The first group of youths ran away, the sixth accused also ran away leaving the fifth accused lying on the road near the drain.

PW19 then went back to the coffee shop to pay the bill, this is confirmed by DW7 Lee Soon Teck, the proprietor of Foo Lok Cafe who said one member of the deceased's group came to settle the bill. PW19 and his three other companions were about to leave the place when Chuan Khim said he wanted to pick up his shoes (exh P9) which he left on the road during the commotion. He was accompanied by Chin Hon Pin and was about to stand up after he had put on his shoes when he was knocked from behind by an oncoming car. He was hit on his thighs. The car was a Proton Saga.

The driver of the car, the second accused, came out with a knife in his hand shouting in Hokkien, 'Kill him, kill him, don't let him go'. Chuan Khim was lying on the road face down. The second accused chopped him on his left hand and on the back of the neck. The second accused's friends, about four to five of them, rushed out and ran towards PW19 who ran into the coffee shop. PW19 then took a chopper (exh D2) intending to help his brother. He saw the second accused and his friends surrounding Chuan Khim, they were attacking him. Chuan Khim did not fight back.

PW19 went into his car feeling scared but was pulled out of the car by the fourth accused. He was hit on the back. The fourth accused in his sworn evidence told the court that he chased one of the assailants and pulled his hair as he tried to get into his car.

PW19 said the first accused then came showing him a cock fighting spur and he attacked PW19 with it. The sixth accused also attacked him using a chair. PW19 said he dropped exh D2, the chopper inside his car. He did not use it.

PW19 told the court that he saw the second accused and his friends hitting Chuan Khim near the corner shop.

A At an identification parade, Chuan Cheng positively identified the first, second, fourth and fifth accused. He could not identify the third accused. There was no identification parade in respect of the sixth accused as according to PW30 his photograph had been published in the local press.

B PW19 was under extensive and intensive cross-examination by the defence counsels. Despite this, he remained steady and was unshaken. I find him to be a very steady witness and I find him to be a witness of truth whose evidence I believe after having seen and observed him.

PW24, Pang Chuan Boon, gave substantially the same evidence, C ie that he, PW19, PW26 and Pang Chuan Khim had gone to Foo Lok on 13 June 1991 at 11.40pm when the fifth and sixth accused rushed in with iron pipes and had a fight with the customers at the next table. During the fight Chuan Khim's car was hit and when he went over to stop them the fifth accused hit him on his left shoulder with the iron pipe. Chuan Boon then used a green plastic chair (similar to exh P4) to D push them away. The sixth accused escaped leaving the fifth accused lying on the road near the drain.

Chuan Cheng then went to settle the bill and as they were about to leave Chuan Khim said he wanted to pick up his shoes. As he was putting on his shoes a car came and knocked him from behind. Chuan E Khim fell on his face. Then the second accused rushed out of the car holding a chopper and he was shouting 'Kill him, kill him, don't let him go.' The second accused pulled Chuan Khim's collar and chopped him on his left arm. Four to five persons rushed out from the car. The fourth accused and one other person rushed towards PW24. The fourth accused was carrying something shiny in his hand. Chuan Boon and F PW26 ran to the shop opposite.

When Chuan Boon ran back to the scene carrying a piece of wood, he saw four to five people attacking Chuan Khim. He saw the fourth accused hitting Chuan Khim with a chair about seven to eight times and he was saying 'You are not dead yet, I keep on hitting until you are G dead.'

PW24 identified the second accused, the fourth accused and the fifth accused at an identification parade.

PW26 Chin Hon Pin in his evidence gave the same story as the other two prosecution witnesses. He said he saw the fifth accused H carrying an iron pipe. Chuan Khim's car was dented. The fifth accused fought with Chuan Boon so Chin Hon Pin grabbed hold of the fifth accused and both of them fell down. The sixth accused ran away leaving the fifth accused lying on the road.

When Chuan Khim was picking up his shoes and putting them on, I an oncoming car came and knocked him from behind. Someone came out shouting 'Kill him, kill him, don't let him go.' Chuan Khim was chopped on his left arm as he tried to ward off the attack from this person who was holding a chopper. He and Chuan Boon ran away.

When they returned armed with a piece of wood, he saw someone hitting Chuan Khim with a chair and saying 'You are not dead yet, I will hit you until you die.' The chair was similar to exh P4.

PW26 identified the fifth accused at an identification parade. Both PW24 and PW26 were extensively and severely cross-examined — they remained unshattered. I find as a fact that these two witnesses are witnesses of truth; they gave their evidence in a steady manner relating to the court the incident that took place.

The autopsy protocol of Dr Hj Sardar Jehan classified the cause of death as due to chest and lung injuries. In her deposition exh P2 her opinion was that the injuries were caused by a variety of instrument. The spindle-shaped wounds were due to a double edged weapon and the s-shaped wounds were caused by spur like objects.

DW8, the medical expert called by the defence, interpreted the autopsy findings. In my considered opinion, DW8's opinion complemented the autopsy findings. He agreed that the fatal injuries were injuries to the lung and chest.

I accept the findings of Dr Jehan in the autopsy protocol.

The six accused gave sworn evidence. All of them denied attacking the deceased but said they were attacked on arrival. All of them confirmed that they were at the Green Dragon Karaoke when the sixth accused came in to tell them the fifth accused was beaten half dead.

From the evidence adduced at this trial, I reject the defence story.

The cautioned statement of Bong Joon Pui (exh P14 and P14A) had to be considered in the light of all the evidence adduced by the prosecution. Section 30 of the Evidence Act 1950 has been dealt with at length in my summing-up. The cautioned statement of Bong cannot be made the foundation of a conviction nor must it be used to fill in gaps in the prosecution evidence. It can only be used to lend assurance and to support other evidence. The accused's version has to be considered too. Having reminded myself of the extent and applicability and scope of s 30 of the Evidence Act 1950 and having reminded myself of the legal principles to be applied regarding the cautioned statement of an accused in relation to the co-accuseds who are not the makers I find as a fact that the first, second and fourth accused caused the injuries sustained by the deceased. I reject the defence contention that the fatal injuries could have been caused by the first fight and inflicted by those other than the accused persons. There is evidence that the deceased did not complain of any injury after the first fight — he walked to the place where his shoes were, he was not staggering. There is ample evidence in the chemist report, exh P7, that there was blood on the car, the Proton KT1866, used by the accused persons.

Common intention can be inferred from the manner the deceased was attacked and from the injuries to his person, and from the way they went to the scene, the words uttered (and I have said I accept, believe and I find as a fact that the prosecution eye witnesses to the incident are

witnesses of truth ie PW19, PW24 and PW26) 'Kill him, kill him, don't let him go.' by the second accused and 'You are not dead yet, I hit you until you die' by the fourth accused clearly show beyond all reasonable doubt that there was common intention and that the accused one, two and four were acting in furtherance of the common intention of them all. From the evidence adduced, I find there is ample corroborative evidence to support the prosecution case. I disbelieve the accuseds' version, I reject them. I find as a fact that the first, second and fourth accused are not witnesses of truth. I find that the prosecution has proved beyond all reasonable doubt that first, second and fourth accused committed the murder of Pang Chuan Khim in the early hours of 14 June 1991 at Lorong Nanas, Nanas Road. I find that the accused person have not raised any doubt as to the truth of the prosecution case or as to the guilt of the accused persons or any of them.

I have at the close of my summing-up given to the gentlemen assessors questions for consideration. For the reasons given above, I concur with the opinion and findings of the gentlemen assessors. Each of the three accused is found guilty and convicted of the offence charged.

As for the fifth accused, I had in my summing-up indicated it was unsafe to convict. No doubt from the evidence adduced at this trial, he started the whole thing. He went to the table where there were customers and hit it with a metal pipe. The first fight started because of him. The sixth accused who was present there was a blind follower. The sixth accused got involved in the fight and then ran to the Green Dragon to get his friends to help Ah Tee, the fifth accused. Indeed if their intention was to assist Ah Tee, second accused and fourth accused would not have uttered those words 'Kill him, kill him, don't let him go' and 'You are not dead yet, I hit you until you die.'

Indeed, they would not have assaulted Chuan Khim in that cruel, cold blooded manner. It was only after the vicious attack that they went back with the fifth accused. There is evidence that Ah Tee was lying down during this second fight. The accused's story is that they carried him unconscious to their car and sent him back to the hotel. This is not consistent with PW28, Lavina Tan's version who said fifth accused was seated in the car.

However, as I have said, s 30 of the Evidence Act 1950 is limited in its applicability. The cautioned statement of Bong cannot be used to supplement the prosecution story; no doubt the cautioned statement implicated the fifth accused. But it does not support the eye witnesses' version. What the fifth accused did when the eye witnesses were not looking cannot be inferred. The cautioned statement cannot be used to implicate him in this manner. The fifth accused was not the maker.

For the reasons given I, with the deepest of respect, beg to disagree with the opinion of the gentlemen assessors in respect of the fifth accused. I invoke s 198 of the Criminal Procedure Code (FMS Cap 6) which reads:

> After having recorded and considered the opinions of the assessors, the court shall give judgment but in so doing shall not be bound to conform to the opinion of the assessors or either of them, provided that the court shall record its reasons for dissenting therefrom.

I find him not guilty of the offence charged for the reasons given above.

For the reasons given above, I concur with the opinion of the gentlemen assessors re third and sixth accused and find them not guilty.

*First, second and fourth accused convicted. Third, fifth and sixth accused acquitted.*

Reported by Richard Leung